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12 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 **OAKLAND DIVISION**

14 ENVIRONMENTAL RESEARCH CENTER,
INC., a non-profit California corporation,

15
16 Plaintiff,

17 vs.

18 SI03, INC., individually and doing business as
19 SYNTRAX, a Delaware corporation; and
DOES 1 through 25,

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21 Defendants.
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CASE NO. 4:19-cv-00640-SBA

**SI03, INC.'S OPPOSITION TO MOTION
TO REMAND AND MOTION FOR
ATTORNEYS' FEES AND COSTS**

Hearing Date: April 10, 2019

Time: 2:00 p.m.

Judge: Hon. Sandra Brown Armstrong

1 **I. INTRODUCTION**

2 The Court should deny both of Plaintiff’s motions as meritless. Cal. Health & Safety Code
3 §§ 25249.5, *et seq.* (“Proposition 65”) does not require a Plaintiff to have purchased, consumed,
4 used, or otherwise have been directly exposed to an accused product. Rather, a party violates
5 Proposition 65 when it fails to provide to the public a warning label in specified circumstances.
6 Thus, any member of the public, including a private party enforcer such as Plaintiff, is injured
7 when a product does not include the required warning. This “informational injury” is the specific
8 injury that Plaintiff alleges Defendant has imparted upon Plaintiff and other members of the
9 public. This and other allegations in Plaintiff’s Complaint confirm that Plaintiff has standing to
10 bring this case in federal court. Moreover, Plaintiff does not contest the parties’ diverse
11 citizenship, and Plaintiff alleges in its Complaint that the amount in controversy exceeds \$1
12 million, rendering frivolous its argument that the amount in controversy threshold is not met.
13 Thus, this case meets all of the requirements of diversity jurisdiction and the Court should deny
14 Plaintiff’s motion to remand.

15 This case turns on the issue of whether Defendant has 10 “employees” as that term is used
16 in Proposition 65 because a company with less than 10 employees is exempt from the
17 requirements of Proposition 65. *See* Cal. Health & Safety Code § 25249.11(b). Defendant gave
18 Plaintiff on November 1, 2018 copies of Defendant’s IRS Form 941 for every calendar quarter
19 from January 1, 2016 through September 30, 2018. These forms are part of Defendant’s required
20 IRS quarterly filings and show, *inter alia*, the “[n]umber of employees who received [from
21 Defendant] wages, tips, or other compensation for the [relevant quarter].” Defendant reported in
22 each of these filings that it had less than 10 employees, including full-time and part-time
23 employees, for every period – a fact that has not changed in the ensuing four months. Therefore,
24 Defendant is exempt from the requirements of Proposition 65. Plaintiff ignored these
25 incontrovertible facts and filed this case seeking, *inter alia*, its own attorney fees.

26 Plaintiff argues that remand is a *fait accompli*, relying on district court decisions while
27 ignoring that the most recent case addressing the same issues presented here – a case from this
28 District in which Plaintiff is a party – is on appeal to the U.S. Court of Appeals for the Ninth

1 Circuit. That case presents the Ninth Circuit its first opportunity to decide whether remand is
2 necessary in the context of a “Proposition 65” matter that relies on the same allegations that are
3 presented here. The Ninth Circuit has never, in an appeal involving a Proposition 65 claim, held
4 that a federal court lacked standing to resolve a matter involving Proposition 65, despite the
5 requirement that federal courts at every level must confirm subject matter jurisdiction. There is no
6 reason to believe that the Ninth Circuit will now, contrary to its prior rulings addressing
7 Proposition 65, decide that federal courts lack subject matter jurisdiction to address Proposition
8 65. Therefore, because this case meets all of the requirements for diversity jurisdiction, the Court
9 should deny Plaintiff’s motion to remand.

10 Finally, Plaintiff’s motion for attorneys’ fees should be denied for two reasons. First, it
11 violates the Court’s Local Rules requiring that such a motion be separately filed. Further, such a
12 discretionary issue should be denied because an objectively reasonable basis exists for
13 Defendants’ removal of this action to this Court. This is particularly true where, as here,
14 controlling authority does not yet exist.¹

15 II. ARGUMENT

16 A. Plaintiff Alleges Injuries In Fact Sufficient To Support Its Article III Standing 17 In This Court

18 Plaintiff’s Complaint alleges that Defendant has failed to properly include warnings
19 regarding several substances allegedly found in Defendant’s products, and that these supposed
20 failures have resulted in violations of Plaintiff’s rights. Moreover, Plaintiff does not contest that
21 the parties are diverse in citizenship. This is sufficient for Article III standing, and the Court
22 should deny Plaintiff’s motion to remand.

23 Federal courts apply a three-part test to determine standing: (i) a cognizable injury to the
24 plaintiff, (ii) that was caused by the defendant’s allegedly improper actions, and (iii) which can be
25 redressed by a court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Standing

27 ¹ Plaintiff filed a Request for Judicial Notice regarding certain exhibits submitted with Plaintiff’s
28 motion. (Dkt. No. 15.) Defendant does not object to that Request.

1 is bounded by prudential limits, including the zone-of-interest test, restrictions on raising third-
2 party rights, and a rule against adjudicating generalized grievances. *See Lexmark Int’l, Inc. v.*
3 *Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). Courts analyze standing from the
4 plaintiff’s merits perspective – in this case that Defendant’s products allegedly violate Proposition
5 65. *See Tyler v. Cuomo*, 236 F3d 1124, 1133 (9th Cir. 2000).

6 **1. Plaintiff Alleges An Informational Injury To Plaintiff That Is Sufficient To**
7 **Support This Court’s Subject Matter Jurisdiction**

8 Plaintiff alleges that Defendant failed to provide Plaintiff and the rest of the public
9 purportedly necessary information that would have allowed a more informed decision regarding
10 Defendant’s products. (Complaint at ¶ 4 (“Defendants’ continued manufacturing, packaging
11 distributing, marketing and/or sales of the Subject Products *without the required health hazard*
12 *warnings*, causes, or threatens to cause, individuals to be involuntarily and unwittingly exposed to
13 levels of the Listed Chemicals that violate Proposition 65.”) (emphasis added)); *see also* Cal.
14 Health & Safety Code §§ 25249.6 (“No person in the course of doing business shall knowingly
15 and intentionally expose any individual to a chemical known to the state to cause cancer or
16 reproductive toxicity *without first giving clear and reasonable warning* to such individual, except
17 as provided in Section 25249.10.” (emphasis added)). Plaintiff’s allegation constitutes an
18 informational injury sufficient to provide “informational standing” in this Court. *See Federal*
19 *Election Comm’n v Akins*, 524 U.S. 11, 19-20 (1998) (holding that refusal to provide statutorily
20 required information constitutes sufficient injury to support Article III standing); *Public Citizen v.*
21 *Department of Justice*, 491 U.S. 440, 449 (1989) (holding that refusal to provide statutorily
22 required information “constitutes a sufficiently distinct injury to provide standing to sue”);
23 *National Educ. Assn v. DeVos*, 345 F.Supp.3d 1127, 1141 (N.D. Cal. 2018) (noting that the
24 Supreme Court held in *Atkins* that “the loss of the information to make a more informed decision
25 constituted a concrete and particular injury in fact.”). Thus, Plaintiff has alleged a sufficient injury
26 in fact, in the form of an informational injury, to support standing in this Court.

27 According to Plaintiff’s Complaint, it is not relevant that Plaintiff may not have consumed,
28 and may have no intention of consuming, any of Defendant’s products. Plaintiff alleges that

1 Defendant’s “continued manufacturing, packaging, distributing, marketing and/or sales of the
2 Subject Products *without the required health warnings*, causes, or threatens to cause individuals
3 to be involuntarily, unknowingly and unwittingly exposed to levels of the Listed Chemicals that
4 violate Proposition 65.” (Complaint at ¶ 4 (emphasis added).) Thus, Plaintiff alleges that it and
5 the rest of the public are exposed to certain substances *not* because Plaintiff or anyone else
6 purchases, consumes and/or uses Defendant’s products in any manner. Rather, according to
7 Plaintiff, Defendant violates Proposition 65 by failing to provide information in the form of the
8 supposedly required health warnings. This is consistent with Proposition 65, which does not
9 require a *qui tam* Plaintiff, or anyone else, to have purchased, consumed and/or used the product at
10 issue. Rather, Proposition 65 requires that a “person doing business,” which excludes anyone
11 employing “fewer than 10 employees,” provide information to the public in specified
12 circumstances. *See* Cal. Health & Safety Code §§ 25249.6; 25249.11(b). Thus, Plaintiff alleges a
13 failure by Defendant to provide supposedly necessary information, which constitutes an
14 informational injury sufficient to provide informational standing. The Court should deny
15 Plaintiff’s motion to remand on this basis alone.

16 **2. Plaintiff Has Standing As An Assignee Of The Injury In Fact Allegedly**
17 **Suffered By The Public**

18 Proposition 65 entices private parties to bring *qui tam* actions such as this one by granting
19 the private parties a piece of the pie, namely 25% of civil penalties assessed against a violator. *See*
20 Cal. Health & Safety Code §§ 25249.12(d). Thus, the State of California assigns to private parties
21 such as Plaintiff, whose sole business appears to be bringing Proposition 65 *qui tam* actions, its
22 claim for the alleged injury in fact suffered by the public arising from a violation of Proposition
23 65. *See Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000) (“A *qui*
24 *tam* relator has suffered no such invasion – indeed, the ‘right’ he seeks to vindicate does not even
25 fully materialize until the litigation is completed and the relator prevails.... We believe, however,
26 that adequate basis for the relator’s suit for his bounty is to be found in the doctrine that *the*
27 *assignee of a claim has standing to assert the injury in fact assigned by the assignor.*” (emphasis
28 added)); *see also Bates ex rel. Bates v. Mortgage Elec. Reg. Sys.*, 694 F.3d 1076, 1080-82 (9th Cir.

1 2012) (affirming denial of a motion to remand a *qui tam* California False Claims Act case that was
2 removed based on diversity jurisdiction and affirming dismissal on the merits of the case).
3 Therefore, Plaintiff has assignee standing in this diversity matter sufficient to support this Court’s
4 subject matter jurisdiction.

5 The language of Proposition 65 allowing parties such as Plaintiff to bring a *qui tam* action
6 confirms that Plaintiff’s role as an assignee does not mean that California is a real party in interest,
7 which would undermine diversity jurisdiction. Proposition 65 allows parties to sue only “in the
8 public interest.” *See* Cal. Health & Safety Code §§ 25249.7(d) (“Actions pursuant to this section
9 may be brought by a person in the public interest....”); Complaint at ¶ 6 (“ERC ... brings this
10 enforcement action in the public interest pursuant to H & S Code § 25249.7(d).”). “[T]his
11 language fails to render [California] a real party in the controversy for the purposes of diversity
12 jurisdiction because these articulated interests are the very ‘general governmental interest[s]’ that
13 the Supreme Court has stated cannot satisfy the diversity requirement.” *Department of Fair*
14 *Employment and Housing v. Lucent Techs., Inc.*, 642 F.3d 728, 738-39 (9th Cir. 2011) (*citing*
15 *Missouri, Kan. and Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 60 (1901)). Thus, there is no basis for
16 Plaintiff to argue that California’s position as the assignor destroys diversity jurisdiction.

17 **B. Plaintiff’s Claims Meet The Prudential Standing Requirement**

18 “[P]rudential standing is satisfied when the injury asserted by a plaintiff “‘arguably [falls]
19 within the zone of interests to be protected or regulated by the statute ... in question.’” *Akins*, 524
20 U.S. at 20 (*quoting National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479,
21 488 (1998) (addition and ellipsis in original)).² In *Akins*, the plaintiff sought redress for the
22 defendant’s failure to provide information required by statute. *Id.* The Court found nothing in the
23 language of the relevant statute suggesting that its benefits were restricted to specific parties. *Id.*
24 To the contrary, the broad language of the statute and the nature of the alleged injury – failure to
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27 ² “Prudential standing” has recently been referred to as the ‘zone of interests’ test. *DeVos*, 345
28 F.Supp.3d at 1138 n.21 (*citing Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1166 n.5).

1 receive statutorily required information – showed that the plaintiff satisfied the “prudential
2 standing” requirement. *Id.*

3 Like the plaintiff in *Akins*, plaintiff here alleges an injury based in Defendant’s failure to
4 provide information purportedly required by statute. (*See supra*, Section II.A.; Compl. at ¶ 4.)
5 Therefore, Plaintiff’s claims satisfy the prudential standing requirement in the same manner as the
6 plaintiff’s claims in *Akins*. Accordingly, the Court should reject Plaintiff’s arguments and deny
7 Plaintiff’s motion to remand.

8 **C. Plaintiff Alleges An Amount In Controversy Well Beyond The Jurisdictional**
9 **Threshold of \$75,000**

10 Notices of removal require only a short and plain statement of the grounds for removal.
11 *See* 28 U.S.C. § 1446(a); *Dart Cherokee Basin Operating Co. v. Owens*, – U.S. –, 135 S.Ct. 547,
12 553 (2014) (“Congress, by borrowing the familiar ‘short and plain statement’ standard from Rule
13 8(a) [for Section 1446(a)], intended to ‘simplify the pleading requirements for removal’ and to
14 clarify that courts should ‘apply the same liberal rules [to removal allegations] that are applied to
15 other matters of pleading.’” (internal citations omitted)).

16 When a plaintiff seeks remand and contests whether the amount in controversy threshold
17 has been met, the Court looks to 28 U.S.C. § 1446(c)(2)(B), which instructs that “removal ... is
18 proper on the basis of an amount in controversy asserted” by the defendant “if the district court
19 finds, by the preponderance of the evidence, that the amount in controversy exceeds” the
20 jurisdictional threshold. *Dart Cherokee*, 135 S.Ct. at 553-54 (noting that Section 1446(c)(2)(B)
21 “clarifies the procedure in order when a defendant’s assertion of the amount in controversy is
22 challenged. In such a case, both sides submit proof and the court decides, by a preponderance of
23 the evidence, whether the amount-in-controversy requirement has been satisfied.”). Plaintiff’s
24 allegations confirm that the jurisdictional threshold is met.

25 Plaintiff asks the Court to impose penalties upon Defendant “in an amount in excess of \$1
26 million.” (Complaint at ¶ 33.) Moreover, considering that Plaintiff alleges 25 products have been
27 in violation of Proposition 65 every single day from August 31, 2015 through the commencement
28 of this action – roughly 2,000 days – at an alleged penalty of \$2,500 per product per day, the

1 allegations in Plaintiff's Complaint far exceed the amount in controversy threshold. (Complaint at
2 ¶ 1, Prayer for Relief ¶ B). Accordingly, the Court should deny Plaintiff's motion to remand.

3 **D. The Court Should Not Remand This Case Merely Because It Is Uncertain**
4 **About The Standing Issue**

5 While uncertainty tends to favor remand, the co-pending appeal in which the Ninth Circuit
6 is set to address the exact issues raised in this motion presents a unique situation. The co-pending
7 case is an appeal from a decision in this Court granting the same Plaintiff's motion to remand over
8 a defendant's arguments that Plaintiff sufficiently pled injury in fact pursuant to, *inter alia*,
9 informational standing and as an assignee. *See Environmental Research Center, Inc. v. Hotze*
10 *Health & Wellness Center Int'l One, L.L.C.*, Case No. 18-cv-05538-VC (N.D. Cal.).³ Defendant
11 respectfully posits that Plaintiff's motion to remand in that other case should have been denied, as
12 Plaintiff's substantively identical motion in this case should be denied, particularly because there
13 is not yet controlling authority. *Hotze* is now on appeal and presents the Ninth Circuit an
14 opportunity to address, for the first time, the exact issues presented here. Notably, the Ninth
15 Circuit has never dismissed an appeal in which Proposition 65 is at issue, despite the fact that
16 every federal court, at every level, must confirm the presence of subject matter jurisdiction. *See*
17 *California v. Kinder Morgan Energy Partners, LP*, 613 Fed. Appx. 561, No. 13-55297 (9th Cir.
18 May 21, 2015) (affirming district court's grant of summary judgment against city on Proposition
19 65 issue); *Industrial Truck Assn. Inc. v. Henry*, 125 F.3d 1305 (9th Cir. 1997) (holding that
20 portions of Proposition 65 are preempted by the Federal Occupational Safety and Health Act and
21 the Occupational Safety and Health Administration's Hazard Communication Standard). There is
22 no reason to believe that the Ninth Circuit will do so now, and this Court should not remand
23 merely because the issue presents some ambiguity. This is particularly true in a situation such as

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26 ³ Plaintiff relies on the court's grant of Plaintiff's motion to remand in the *Hotze* case, (Mtn. at 8-
27 9), but fails to inform the Court that the decision is on appeal. (*See* Ninth Circuit Appeal No. 18-
17463.)

1 this one where there is no controlling authority and the Ninth Circuit is poised to address the
2 issues.

3 If this Court correctly holds that it has standing to hear this case, and the Ninth Circuit later
4 determines that standing is not present in this context, the case can be remanded at that time, and
5 the parties' pleadings and discovery transferred to the state court action. *See* 28 U.S.C. § 1447(c)
6 ("If at any time before final judgment it appears that the district court lacks subject matter
7 jurisdiction, the case shall be remanded."). On the other hand, if the Court remands at this stage,
8 and the Ninth Circuit finds that Article III standing *is* present in this context, as Defendant
9 anticipates it will do, Defendant may not be able to remove this case at that time. *See* 28 U.S.C. §
10 1446(c)(1) (foreclosing removal more than one year after commencement of the action unless the
11 plaintiff is shown to have acted in bad faith to prevent removal). Therefore, the Court should not
12 remand this case simply because uncertainty tends to favor remand; instead, the Court should deny
13 Plaintiff's motion on its merits.

14 **E. There Is No Basis For An Award Of Plaintiffs' Attorneys' Fees Or Costs**

15 The award of attorneys' fees in connection with a remand is a discretionary matter. *See* 28
16 U.S.C. § 1447(c) ("An order remanding the case *may* require payment of just costs and any actual
17 expenses, including attorney fees, incurred as a result of the removal."). The Court should deny
18 Plaintiff's motion for attorneys' fees for two reasons.

19 *First*, Plaintiff's motion violates the Local Rules of Practice in Civil Proceedings for the
20 Northern District of California, and this Court's Standing Orders. Local Rule 7-8 states that
21 "[a]ny motion for sanctions, regardless of the source of authority invoked, must comply with the
22 following: (a) The motion must be separately filed and the date for hearing must be set in
23 conformance with Civil L.R. 7-2; [and] (b) The form of the motion must comply with Civil L.R.
24 7-2...." Civil L.R. 7-8. Plaintiff's motion violates both of these requirements and, therefore, also
25 violates this Court's Standing Order – Civil No. 1 ("Conformity to Rules"). Courts in this District
26 consistently deny motions seeking sanctions, including attorneys' fees, for violation of Civil L.R.
27 7-8(a) & (b). *See, e.g., Cooks v. Wells Fargo Bank, N.A.*, Case No. 17-cv-02539-MMC, 2017 WL
28 3129203, *4 (July 24, 2017 N.D. Cal.); *Ambrosia v. Cogent Commc'n, Inc.*, 312 F.R.D. 544, 559

1 n.20 (N.D. Cal. 2016); *Estrada v. Sayre*, Case No. 12-0592 LHK (PR), 2014 WL 3728161, *6
2 (July 28, 2014 N.D. Cal.); *Abels v. JBC Legal Group, P.C.*, Case No. 04-cv-2345 JW (RS), 2005
3 WL 3839308, *3 (Oct. 21, 2005 N.D. Cal.).

4 It also is worth noting, though Plaintiff ignores it, that Judge Chhabria denied Plaintiff's
5 identical motion for attorneys' fees in the recent decision that Plaintiff relies so heavily upon, the
6 December 21, 2018 order in *Environmental Research Center, Inc. v. Hotze Health & Wellness*
7 *Center Int'l One, L.L.C.* (See Dkt. No. 14-2, Exh. 2 to the Declaration of Anthony Barnes in
8 Support of Plaintiff's Motion). Indeed, considering the extent to which Plaintiff's motion here
9 mirrors its motion in *Hotze*, where Plaintiff's motion for attorneys' fees was denied, it appears that
10 Plaintiff is improperly trying to take a second bite at the apple by asking this Court to order
11 Defendant to pay Plaintiff's attorneys' fees actually incurred in the other case to prepare the
12 identical motion.

13 **Second**, even if Plaintiff were able to overcome its violation of the Civil Local Rules and
14 this Court's Standing Orders, the Court should deny Plaintiff's motion because the Supreme Court
15 has directed that "[a]bsent unusual circumstances, courts may award attorney fees under § 1447(c)
16 **only** where the removing party lacked an objectively reasonable basis for seeking removal."
17 *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (emphasis added). Accordingly,
18 "when an objectively reasonable basis exists, fees should be denied." *Id.*

19 As set forth above, Defendant has an objectively reasonable basis for seeking removal,
20 including that Plaintiff's allegations in its Complaint (i) set forth an injury in fact sufficient to
21 support Plaintiff's standing in this Court, and (ii) claim an amount in controversy that far exceeds
22 the jurisdictional threshold. Further, Plaintiff does not contest the parties' diverse citizenship.
23 Therefore, all elements necessary for subject matter jurisdiction pursuant to diversity of
24 citizenship have been met. Moreover, Plaintiff's core argument – that a Proposition 65 matter
25 cannot be addressed in federal court without a claim seeking remedies under another statute – is
26 not supported by any binding authority. To the contrary, as explained above the Ninth Circuit has
27 never dismissed a Proposition 65 case on subject matter jurisdiction grounds. And before Plaintiff
28 filed the instant motion, the defendant in *Hotze* filed its appeal asking the Ninth Circuit to consider

1 for the first time the issues raised both in that case and this one. Without controlling authority, it
2 cannot be said that Defendant's bases for removal are "objectively [un]reasonable."

3 The Court should deny Plaintiff's motion for attorneys' fees both because the motion
4 violates the Civil L.R. and this Court's Standing Orders, and because Defendant's positions in
5 support of removal are objectively reasonable.

6 **III. CONCLUSION**

7 The Court should deny both Plaintiff's motion to remand, and Plaintiff's motion for
8 attorneys' fees and costs, and allow this case to proceed in this Court.

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10 DATED: March 14, 2019

By: /s/ Kevin J. O'Shea

11 Kevin J. O'Shea
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